U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued:September 13, 2001

BALCA Case No. 2001-INA-67
ETA Case No. P2000-PA-0334

In the Matter of:

ROMA'S PIZZA - ITALIAN RESTAURANT
Employer,

on behalf of

MASSIMILIANO CARUSO
Alien.

Appearance: Niko Paul, Lay Representative
Astoria, New York

Certifying Officer: Richard Panati
Philadelphia, Pennsylvania

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Specialty Cook.[1] The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

[1] Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On October 16, 2000, Employer, Roma's Pizza - Italian Restaurant, filed an application for labor certification to enable the Alien, Massimiliano Caruso, to fill the position of "Cook - Italian Specialty Food." (AF 31). The job requirements were two years of experience in the job offered. The job entailed the preparation and cooking of all Italian specialty dishes per the menu as well as daily specials.

The CO issued a Notice of Findings ("NOF") on January 3, 2001, proposing to deny certification. (AF 27). The CO found that Employer had improperly listed the job as a "Cook, Specialty, Foreign Food 313.361-030," which had a combined education, training and/or experience requirement of two to four years. The CO determined that the job was more accurately classified as (1) "Cook, Specialty 313.361-026," which had a requirement of six months to one year of combined education, training and/or experience; or (2) a combination of a Cook, Specialty and the other lesser skilled cooking occupations of Baker, Pizza and Sandwich Maker, all of which had lesser education, training and experience requirements than that of Cook, Specialty, Foreign Food. The CO found that the requirement of two years of experience in the job, as required by Employer, was unduly restrictive, because it exceeded the Dictionary of Occupational Titles ("DOT") standard for those classifications which the CO found the job to fit. The CO noted that, contrary to the listing for a Cook, Specialty, Foreign Food, the cook in Employer's restaurant did not prepare soups, salads, gravies, desserts, sauces and casseroles, nor did the cook bake, roast, broil, and steam meats, fish, and vegetables. The CO determined that Employer's business appeared to be primarily a sandwich and pizza shop serving a very limited number of foreign (Italian) food selections. The foreign foods listed did not require extensive training in cooking to prepare and cook, and the preparation of these food items did not correspond with the job duties of a Cook, Specialty, Foreign Food, which was a highly skilled occupation.

Taking into consideration the DOT classifications of "Cook, Specialty, "Baker, Pizza" and "Sandwich Maker," a combination of which appeared to fit the job being offered, it was the CO's determination that six months to one year was an appropriate experience requirement. Employer was advised that in order to rebut the NOF, it needed to (1) submit evidence that the job requirement arose from a business necessity; or (2) reduce the requirements to the DOT standard. If Employer chose to prove business necessity, it was advised that it needed to demonstrate that the job requirement bore a reasonable relationship to the occupation in the context of its business and was essential to perform, in a reasonable manner, the job duties described.

Employer's representative submitted rebuttal on February 2, 2001. (AF 13). Therein, Employer argued that its menu included a sampling of homemade pasta and homemade lasagna, as well as daily specials, a list of which was included with the rebuttal. It was pointed out that all sauces were prepared at the restaurant, and that several Italian specialty foods were listed as being prepared at the restaurant. Employer's representative contended that with the information provided in rebuttal, it was

"clear there is nothing 'unduly restrictive' about the job requirements and Employer's need for the services of a Cook - Italian Specialty Food." The menu, which was included, listed Dinners, Chicken and Fish, Salads, Cold Subs, Hot Sub and Steaks. Employer pointed out that the items on the menu required proper preparation, seasoning and cooking of meats and sauces, eggplant, meatball, sausage, chicken and veal parmesan. A list of nine different specials was included in the rebuttal letter, which Employer pointed were not all prepared on a daily basis.

The CO issued a Final Determination ("FD") on February 7, 2001, denying certification. (AF 11). The CO found that the evidence failed to show that the position required two years of experience. The CO determined that the menu clearly established that Employer was primarily a pizza and sandwich shop, which also offered some dinners. The dinners, however, were extremely limited in number and variety, and were ones which had become standard fare in American cuisine and cooking, such as pasta, lasagna and various types of parmigiana. The requirement of two years of experience, therefore, was unduly restrictive, as the position was not akin to that of "Cook - Specialty Foreign Food."

The CO asserted that contrary to Employer's assertion in its rebuttal, no list of daily specials had been provided, further finding that there was no indication that the dinner selections changed from week to week or from menu to menu as they would in a full-service restaurant. The majority of the menu items were simply and quickly prepared and did not correspond to the job duties of a Cook, Specialty, Foreign Food. According to the CO, such a position would involve preparation of five leading sauces and thirty small sauces, as well as knowledge of how to use the six dry heat methods of cooking, the three moist-heat methods of cooking and the preparation of stocks and sauces, soups, and numerous other items.

Employer's representative filed a motion for reconsideration on February 21, 2001, (AF 2), which was denied by the CO on March 1, 2001. (AF 1). The CO advised Employer that its application was being forwarded to the Board of Alien Labor Certification Appeals ("BALCA" or "Board") for review. (AF 1).

DISCUSSION

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. An employer cannot use requirements that are not normal for the occupation or are not included in the DOT unless it establishes a business necessity for the requirement. The purpose of section 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Rajwinder Kaur Mann*, 95-INA-328 (Feb. 6, 1997).

Employer can establish a business necessity by showing that (1) the requirement bears a reasonable relationship to the occupation in the context of the Employer's business; and (2) the requirement is essential to performing, in a reasonable manner, the job duties as described by the Employer. *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989)(*en banc*). Employer may not

require any more strict requirements than are listed in the DOT classification for the job. *Approach, Inc.*, 90-INA-230 (Aug. 29, 1995).

Employer has resubmitted its letter filed as a Motion to Reconsider, as its appeal brief to the Board. Therein, it argues that it did provide a list of its daily specials, in page two of its rebuttal, and that the rebuttal described "a certain number of Italian foods already on the menu which require proper preparation, seasoning and cooking, including all the sauces prepared at the restaurant." Accordingly to Employer this included, eggplant, meatballs, sausage dishes, chicken and veal dishes as well as homemade pastas and homemade lasagna. Employer further contends that the requirements of its position do not fall into the category of "Cook - Specialty" as claimed by the CO, and that the category it listed was the appropriate one. Employer argues that it never included the items of pizzas and sandwiches as part of the food items which were part of the job duties of the cook.

Citing the FD, Employer questioned the CO's description of the job duties of a Cook, Specialty, Foreign Food, as including the five leading sauces and thirty small sauces, as well as the remainder of the CO's description which was not a part of the DOT description. Employer questioned why the job title set forth at DOT 313.361-014 was not utilized by the CO, that position also requiring up to two years of experience and/or training. Employer included an approved labor certification in another case, as well as a copy of recent newspaper advertisements in support of its argument.

As a preliminary matter, we will not consider the material submitted by the Employer in connection with the request for review. Our review is to be based on the record upon which the denial of labor certification was made, the request for review, and any statement of position or legal briefs. 20 C.F.R. 656.27(c). *See also* 20 C.F.R. 656.26(b)(4). Thus, evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant*, 1990-INA-480 (Jan. 7, 1992). Furthermore, where an argument made after the FD is tantamount to an untimely attempt to rebut the NOF, the Board will not consider that argument. *Huron Aviation*, 1988-INA-431 (July 27, 1989). Therefore, the newspaper advertisements, newly proposed DOT category for the position at issue, and the labor certification in an entirely unrelated case, will not be considered herein. With respect to the latter, this Board is not bound by findings of a CO in similar cases. *See Tedmar's Oak Factory*, 1989-INA-62 (Feb. 26, 1990). Thus, it has been held that where an Employer submitted as documentation in a case, a copy of an approved labor certification application, the argument was dismissed because each labor application involves its own set of facts and issues and therefore, "submission of another employer's approved application does not set any precedent to which the CO [or the Board] is bound." *Paralegal Priorities*, 1994-INA-117(Feb. 1, 1995).

The CO has challenged Employer's classification of the position under the DOT, and Employer has objected to the re-classification made by the CO. It is well established that the DOT is a flexible document, and that it should not be applied mechanically. *Lev Timashpolsky*, 1995-INA-33 (Oct. 3, 1996). Using the DOT as an "occupational guideline" is necessary as the DOT is unable to list every job opportunity within the United States. Thus, the DOT must be utilized in a fashion which supports

the intent of the law, and provides a flexible framework which must then be analyzed "in the context of the nature of Employer's business and the duties of the job itself." *Trilectron Indus.*, 1990-INA-188 (Dec. 19, 1991). As a result, it has been held that the CO may challenge, *inter alia*, the employer's classification of a particular position. *Downey Orthopedic Medical Group*, 1987-INA-674 (March 15, 1988)(*en banc*). Employer is then required to provide sufficient evidence to rebut the re-classification. *Theresa Vasquez*, 1997-INA-531 (July 9, 1998).

This Board finds that Employer is correct in its contention that the CO appears to have overlooked the listing of daily specials provided by Employer in its rebuttal. While remand has been deemed appropriate where the CO fails to adequately address Employer's rebuttal and documentation, *Reepu & Savitrie Singh*, 1991-INA-110 (August 3, 1992), the oversight on the CO's part in this case does not alter the outcome, and therefore, is harmless error at best. Similarly, the CO's detailing of what he believed was entailed in the position of a Cook, Specialty, Foreign Food, as first set forth in the FD, does not negate the fact that the NOF fully apprised Employer of the deficiencies in the application, and what was required to rebut the NOF.

Employer's menu, even when the daily specials are included is, as the CO noted in the NOF, of a limited nature such that six months to a year of combined training, education and experience should be sufficient. The menu Employer provided indicates it is a "dine in" or "carry out" facility. Dinners consist primarily of simple spaghetti dishes, and other Italian dinners normally seen in casual American dining. Other items listed under "Chicken and Fish" include chicken fingers, shrimp baskets, chicken wings and buffalo wings. There are also several salads, and one page of the menu is devoted to cold subs, hot subs and steaks, all the steaks being cheese steaks. Another page is devoted to Pizza and stromboli. These are not menu items which would require two to four years of experience to learn to prepare, nor has Employer provided compelling rebuttal establishing otherwise.

The DOT indicates, in pertinent part, that a Cook, Specialty, Foreign Food plans menus and cooks foreign-style dishes, dinners, desserts, and other foods according to recipes. The cook prepares meats, soups, sauces, vegetables, and other foods prior to cooking, and serves food to waiters on order. As the NOF points out, Employer has not established that the position requires the elaborate preparation of foods as set forth in job description of a Cook, Specialty, Foreign Food.[2] The CO correctly points out that the position more closely resembles that of a Cook, Specialty, which requires six months up to and including one year of combined education, training and experience, and involves the preparation of specialty foods, such as fish and chips, tacos and pastries, and involves serving

[2] Employer's listing of the position as one which requires two years of experience may be linked to the Immigration Act of 1990 (IMMACT 1990), which reduced the number of immigrant visas available to unskilled alien workers (aliens granted labor certification in occupations requiring less than two years of experience.) The visa waiting period for aliens in the unskilled category now exceeds five years, while visas for skilled alien workers(aliens granted labor certification in occupations requiring at least two years of experience) are currently available without a waiting period.

customers at a window or a counter. In this respect, there was no indication from Employer that his restaurant is a sit-down establishment with waiters. What the menu does show is that it is a carry-out, dine in establishment with free delivery for orders over Six ($6.00) Dollars. The foods prepared are not elaborate, and indeed have become standard American fare.

Employer has failed to provide sufficient evidence to rebut the re-classification of the position as made by the CO. It has also failed to establish a business necessity for the experience requirement, having failed to demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties described by the employer. Employer has also failed to offer to reduce the requirements to the DOT standard. Labor certification was properly denied, and the following order shall issue.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

Entered at the direction of the panel:

Todd R. Smyth, Secretary to the Board
of Alien Labor Certification Appeals

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and

manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.